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;MCC:MEH:slg:2001V00699

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALLEN MORSLEY, Petitioner	:	No. 1:CV-01-1003
v.	:	(Judge Kane)
DONALD ROMINE, Warden, Respondent	:	

RESPONDENT'S RECORD IN SUPPORT OF ITS
SUPPLEMENTAL RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS

MARTIN C. CARLSON
United States Attorney

MATTHEW E. HAGGERTY
Assistant United States Attorney
SHELLEY L. GRANT
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Harrisburg, PA 17108-1754
717/221-4482

Date: December 19, 2001

INDEX

Record No.

AO 243 (Rev. 5/85)

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

FILED
APR 22 1997
DAVID W. SAXTON, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

United States District Court	District EASTERN DISTRICT	
Name of Movant Mr. ALLEN MORSLEY	Prisoner No. 14718-056	Case No. 93-102-CR-5-97-C-30
Place of Confinement Luisburg U.S.P.		

UNITED STATES OF AMERICA V. ALLEN MORSELY AKA JOHN DOE
(name under which convicted)

MOTION

1. Name and location of court which entered the judgment of conviction under attack UNITED STATES COURT, FOR THE EASTERN DISTRICT OF WILMINGTON, NORTH CAROLINA.

2. Date of judgment of conviction NOVEMBER 24, 1993

3. Length of sentence LIFE IMPRISONMENT

4. Nature of offense involved (all counts) Title 21, United States Code, Section 841 (a) (1)-18 u.s.c. 1342 (2)- 922(g)- 924(h)

5. What was your plea? (Check one)
   (a) Not guilty ☑
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

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9. If you did appeal, answer the following:

(a) Name of court UNITED STATES COURT FOR THE FOURTH CIRCUT

(b) Result CONVICTION AFFIRMED

(c) Date of result Sept. 23, 1993

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result N/A

(6) Date of result N/A

(b) As to any second petition, application or motion give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

N/A

(3) Grounds raised

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(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result N/A

(6) Date of result N/A

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☐ No ☒
(2) Second petition, etc. Yes ☐ No ☒

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

N/A

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all ground in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

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(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: The Trial Court violated Petitioner's due Process right, when sentencing Petitioner as a Career Offender based on his prior criminal history.

Supporting FACTS (state *briefly* without citing cases or law) The Prior predicate criminal convictions, that the court relied upon to enhance Petitioner as a career offense does not meet the criteria of the Federal Sentencing Guidelines, under 4B1.1

"See Memorandum of Law"

B. Ground two: Petitioner was denied Effective assistance of counsel in violation of his Sixth and Fifth amendment rights.

Supporting FACTS (state *briefly* without citing cases or law): Ineffective Assistance of counsel resulted when defense counsel failed to research and prepare for sentencing and failed to object to the improper career offenders sentence.

" See Memorandum of Law"

C. Ground three: Petitioner Was denied Effective Assistance of Counsel in violation to his Sixth amendment Right.

Supporting FACTS (state *briefly* without citing cases or law): Petitioner Was denied effective assistance of Counsel when counsel denied Petitioner the right to testify on behalf of his own defense.

"See Memorandum of Law"

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D. Ground four: Petitioner Was Denied Effectives Assistance of Counsel in violation of his Sixth Amendment Right.

Supporting FACTS (state *briefly* without citing cases or law): Ineffective Assistance of Counsel resulted where counsel labor under an actual conflict of interest, and thus breached his duty of loyalty to Petitioner, whereby, causing an acual and complete brake down in the adversarial testing process.

"See Memorandum of Law"

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: none of the grounds previously listed were file in lower courts, Counsel ineffectiveness wouldn't permit.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Robert Cooper

(b) At arraignment and plea Robert Cooper

(c) At trial Robert Cooper

(d) At sentencing Pro- SE with judges permition

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(e) On appeal My direct appeal was represented by attorney---
Kevin M. Schad, Liberty Legal services 1111 East Main Street
Richmond VA 23219.

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

APRIL 15TH 1997
(date)

Signature of Movant

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IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILIMINGTON DIVISION

CASE NO. 93-102-07-CR-5-F

ALLEN MORSLEY-MOVANT

VS.

UNITED STATES OF AMERICA-RESPONDENT

MOVANT MORSELY'S MEMORANDUM OF LAW IN SUPPOR OF RELIEF PURSUANT TO MOTION UNDER TITLE 28 U.S.C. § 2255 AND ACCOMPANYING MEMORANDUM OF LAW, IN SUPPORT OF RELIEF

MOTION UNDER 28 U.S. C. § 2255
MEMORANDUM OF LAW
IN SUPPORT OF
RELIEF

ALLEN MORSLEY

COMES NOW, ALLAN MORSELY, Pro Se, Movant, and respectfully moves this Honorable Court, pursuant to title 28 U.S.C. § 2255, to Vacate, Set Aside or Correct the sentence of the District court in the foregoing cited case, 93-102-07-CR-5-F. Movant Morsley bases his right to the vacation of his conviction and Sentence on the consolidated Memorandum of law, in support of this motion.

In addition to this motion and memorandum of law, movant would respectfully submit to this Court that he is not trained in law, and therefore, moves this Honorable Court to construe this motion liberally. See **HAINES v. KERNER, 404 U.S. 519, S.Ct. 594 (1972);also BOAG v. MacDOUGALL, 454 U.S. 364, 70 L.Ed.2d 551, 102, S.Ct. 700 (1982)** Pro Se litigants pleadings are to be construed liberally and held to less stringent standards than pleadings drafted by lawyers, if court can reasonably read pleading to state a valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusing legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements....

STATMENT OF QUESTIONS OF LAW

(1) Whether movant was denied his due process rights, where the District court sentenced movant as a career offender, relying on a prior predicate criminal conviction which did not meet the criteria of the Federal Sentencing Guidelines, under 4B1.1

Movant says yes

(2) Did Ineffective Assistance of Course result, where defense counsel failed to propely familiarize himself to research and prepare for sentencing, and failed to object to the improper career offenders sentence.

Movant says yes

(3) Can Movant's Conviction and Sentence Stand Where Movant was denied his Sixth amendment Rights, when counsel denied Movant the right to testify in his own defense.

Movant says no

(4) Was Movant Denied Effective Assistance of Counsel as guaranteed by the United States Constitution, when counsel labored under an actual conflict of interest, and thus breached his duty to loyalty to Movant, whereby, causing an actual and complete brake down in the adversarial testing process.

Movant says yes

ARGUMENT AND LEGAL AUTHORITIES ON ISSUES RAISED

I.

THE TRIAL COURT VIOLATED MOVANT'S DUE PROCESS RIGHTS WHEN SENTENCING MOVANT AS A CAREER OFFENDER BASED ON HIS PRIOR CRIMINAL HISTORY, WHICH DID NOT MEET THE CRITERIA OF THE FEDERAL SENTENCING GUIDELINES UNDER § 4B1.1

"[D]ue process flexible and class for such procedural protections as the particular situation demands. **MORRISEY v. BREWER, 408 U.S. 471, 481, 33 L.Ed.2d 484, 494, 92 S.Ct. 2593 (1972).**

Whether any procedural protections are due depends on the extent to which an individual will be condemned to suffer grievous loss". Id. "The question is not remerely the **"weight"** of the individua's interest, but rather the nature of the interest is one within the contemplation of **"liberty"** as he has been improperly sentenced to an incorrect prison term; Moreover, the sentencing process fails to meet the rudimentary demands of the due process requirement of the U.S. Constitution. Specifically , **"the language of the Fifth amendment". Id.**

The question to be answered here aare whether the sentencing process conformed with "fundamental principles of liberty and justice which lay at the base of all our civil and political institutions: (cite ommitted), whether it was infected with fundamental defects resulting in a miscarriage of justice, and whether it was consistant with the rudimentary demands of fair procedure. See **U.S. v. MALCOM, 432 F.2d at 805 (2nd Cir. 1970)(quoting Bill v.**

U.S.) 368 US at 428..... In the instant case, petitioner Allen Morsley during his sentencing hearing was sentence to a term of Life imprisonment , Under 4B1.1 "Career Offense".

The prior offenses the Government utilized to enhance the petitioner was as follows....

(A) ATTEMPT BUURGLARY IN THE 3rd degree

(B) ATTEMPT BURGLARY IN THE 3rd degree

(C) The instant offense

each of the prior criminal history points totaled to amount to (7) seven additional points to be computated .

The Government alleges that because petitioner committed the two prior offenses, namely stipulation(a) and (b), as listed above; the defendant meets the criteria of A career offender; §4B1.1. The language in section 4B1.1 of the Fed Rules criminal procedure, clearly describes that the nature of the crimes that the defendant has committed should include the following...

DEFINITIONS OF TERMS USED IN SECTION 4B1.1

The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that.....

(i) has as an element the use, attempt use, or threatened use of physical force against the person of another,or

(ii) is burglary of a dwelling,arson, or extortion,involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Nothing in the Rule suggests that a defendant who has committed a crime of attempted bulary. The language under 4B1.1, specificly section (ii) emphasizes the use of extremely aggressive behavior or conduct, which conduct exhibits a serious potential risk of physical injury to another.

As an indication, the petitioner was erroneously characterized as a career offender and was subsequently enhanced to a sentence as such. The erroneously use of a mischaracterized prior offense to enhance the petitioner as stated above in stipulation(B)(see preceding page) that prior offense consisted of an attempt burglary, inconsistent with nature of the offense that required. In fact, the nature of that prior offense in (B) doesn't meet the standards set forth in 4B1.1 (i) or (ii). As previously stated, In (ii) of Rule 4B1.1; it clearly express the need of extreme aggressive conduct, so much so that such conduct demonstrates potential risk of serious physical injury; and I submit that kind of conduct didn't exist in stipulation(B) nor was that kind of behavior exhibited in the instant case.

Further more, The term attempt burglary mitigates the seriousness in the language of section (ii) 4B1.1, and fail's to fulfill the requirements of the Rule.

So, because the courts sentenced petitioner to a term of imprisonment described in 4B1.1 while petitioner's prior criminal history doesn't necessitate such a sentence, the courts judgement resulted in a miscarriage of justice and was not consistent

with the rudimentary demends of fair procedure, thus failing to conform with the language of the fifth amendment of the U.S. Const. ID. See U.S. V. Malcom, 432 F.2nd at 805 (2nd cir. 1970)..... (quoting Bill V. US. ID.).

With respect to this salient misconsideration of..... petitioner's prior criminal offense, namely stipulation (B). The petitioner respectfully requests that the court to resentence him to the appropriate terms of the guidelines.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL RESULTED, WHERE COUNSEL FAILED TO PROPERLY FAMILIARIZE HIMSELF TO RESEARCH AND PREPARE FOR SENTENCING AND FAILED TO OBJECT TO IMPROPER CHARACTERIZATION CONSTITUTING CAREER OFFENDERS SENTENCE.

Petitioner Morsley next contend's that he was denied his sixth amendment Right to effective Assistance of Counsel as guaranteed by the United States Constitution, where Counsel failed to properly familiarize himself to research and prepare for sentencing and failed to object to Governments improper characterization of petitioners prior criminal history offenses.

Under the standards set forth in **Strickland V. Washington, 466 U.S. 668, 104 s. ct 2052, 80 L. Ed. 2d 674 (1984)**, a habeas corpus petitioner seeking relief because of ineffective Assistance of counsel, must show that his counsels performed at a level below what is considered competent, and were it not for his defective representation, the probability exist that the outcome of the proceeding would have been different..... It should further be noted by this Court **Strickland**, the result of the proceeding

can be rendered unreliable, and hence the proceeding itself unfair, even if the error of counsel can not be shown by a preponderance of evidence to have determined the outcome. **Id. 466 U.S. 694,104 S.ct. 2068.** Petitioner Morsley contends that had Counsel Raised the proceeding issues in the lower court or on direct appeal, the results of the proceeding would have been dramaticcally different.

In this contention however, the petitioner asserts that his Counsel was Ineffective by failing to familiarize himself to research and prepare himself for sentencing and failed to object to the improper characterization resulting to a Career Offenders sentence of the petitioner.

As a requirement during his performance, Counsel has a duty to familiarize himself with materials provided by the opposing party. When Counsel, in the mist of his performance, fail to familiarize himself with the materials made available to him, renders performance contitutionally defient. **Williams V. Washington 59 F3d 673. (7th Cir. 1995).....mere failure of counsel to familiarize himself with materials provided him by the prosecution satisfy's the 1st prong in Strickland, 446 U.S. 668.**

In Williams V. Washinton, The District court was not precluded from considering petitioner's complaint's regarding counsel's defient performance where petitioner made precisely same complaint in state court briefing, that trial counsel failed to become familiar with letter by victim which was alleged to detail incidents of abuse for which petitioner was convicted, and that counsel failed to object to admission of letter as hearsay and failed to use letter to cross examine victum once letter was admitted.

Similarity to the instant case, prior to petitioner sentencing hearing , petitioner Morsley, in a letter to his attorney dated Feb. 5, 1994, requested his attorney for an additional Copy of his P.S.I. and simultaneously requesting his attorney to object to the contents of his P.S.I. (This letter was filed in open on March 8, 1994). Yet, despite petitioners repeated request for his attorney to forward him an additional copy of his P.S.I. report for purposes of raising objections to his sentencing, The attorney despite this opportunity to become aware with his client's contention with the report, failed to familarize, research and object to the mischaracterization of the improper history catagory. (jaI : 233-235), (jaI : 245), the court precluded to acknowledge petitioner's contention as a result of counsel's failure to object. (see also page 58. of petitioner's appellant brief). Because counsel's failure to familiarize and subsequently object to the contents of the report, petitioner was unjustly sentence to a term of imprisonment Under Rule 4B1.1, thus satisfying the 2nd prong in **Strickland Id.** Had counsel indentified and challenge the erroneous characterization of the prior criminal history, the outcome of the proceeding directly and substantially would have been different. (See motion I. page 1. of this petition).

CONCLUSIONS

Petitioner Allen Morsley hereby declares, that the forgoing motions of (1) Movant was denied due process rights, where the district court sentenced movant as a career offender, (2) Counsels failure to familiarize himself with materials resulted in his ineffectiveness , warrant this Honorable court to vacate, set aside or correct the sentence, pursuant to title 28 U.S.C. §2255.

Respectfully Submitted

Allen Morsley

CERTIFICATE OF SERVICE

I, **ALAN MOSLEY,** hereby certify that a true and accurate copy, coupled with two (2) photo-copies of the forgoing Motion Under title 28 U.S.C. § 2255, has been caused to be forwarded by U.S. Postal mail on this 5th day of Sept 1997, to the Clerk's Office, in the United States District Court for the Eastern District of North Carolina, P.O. Box 338 Wilimington 28402.

Respectfully Submitted

Allen Mosley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:93-CR-102-07-F
No. 5:97-CV-302-F

ALLEN MORSELY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER

Petitioner's April 25, 1997, Motion for a 60-Day Extension of Time to supplement his § 2255 motion is DENIED.

SO ORDERED.

This 5th day of May, 1997.

JAMES C. FOX
United States District Judge

Sue Bradley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:93-CR-102-07-F
No. 5:97-CV-302

ALLEN MORSELY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

O R D E R

This matter is before the court for preliminary consideration, pursuant to Rule 4, Rules Governing Proceedings under 28 U.S.C. § 2255. According to Rule 4, "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified."

Petitioner was convicted after a trial by jury of conspiracy to possess with intent to distribute and distribution of cocaine and cocaine base, using or carrying a firearm during and in relation to a drug trafficking offense, three counts of wire fraud and aiding and abetting, two counts of dealing in firearms without a license, and possession of firearms with obliterated serial numbers. He also was convicted of contempt of court. For these convictions, he received a life sentence, plus

60 months, with an additional 60 months to run concurrently, plus six months; that is, life plus 66 months.

Petitioner's guideline range was 360 months to life imprisonment, plus 60 months, exclusive of the sentence for contempt of court. His base offense level was increased from 36 to 37 as a result of his being deemed a "career offender" under U.S.S.G. § 4B1.1. Both of the predicate "crimes of violence" were convictions for "Attempted Burglary, 2nd degree, Superior Courts,QNY." The dates of arrest were about one year apart, the first being on March 3, 1982, and the second on April 21, 1983. He received a sentence of one to three years on each conviction.

In the instant motion, petitioner contends his sentence was improperly calculated, in that he should not have been deemed a career offender. Specifically, petitioner argues that his two prior attempted burglary convictions do not demonstrate the sort of extremely aggressive behavior exhibiting a serious potential risk of physical injury to another which are intended to constitute predicate offenses for career offender status.

As petitioner recognizes, U.S.S.G. § 4B1.2 defines "crime of violence" as

> [A]ny offense under federal or state law punishable by imprisonment for a term exceeding one year that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

> (ii) is burglary of a dwelling, arson or extortion, involves use of explosives, or otherwise involved conduct that presents a serious potential risk of physical injury to another.

However, petitioner has overlooked § 4B1.2, Application Note 1, which states:

> The terms "crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and *attempting* to commit such offenses.

(Emphasis added). See also United States v. Raynor, 939 F.2d 191 (4th Cir. 1991) ("[f]or purposes of federal sentencing, a crime of violence by definition includes one that involves a substantial *risk* that physical force against the person or property of another *may be used* in committing the offense;" attempted breaking and entering a temporarily unoccupied residence is a crime of violence under § 4B1.2); cf. United States v. Aragon, 983 F.2d 1306, 1313 (4th Cir. 1993) (likelihood of physical force upon interruption of attempted escape "at least as great as that presented when temporarily absent resident return home and encounters a burglar." Citing Raynor, 939 F.2d at 196)); United States v. Davis, 881 F.2d 973, 976 (11th Cir. 1989) (conclusion that burglary of a dwelling constitutes a "crime of violence" well-founded in light of potential that residents, out of alarm and fear, "may react with measures that may well escalate the criminal purpose of the intruder"), cert.

denied, 493 U.S. 1026 (1990). See also Aragon, 983 F.2d at 1314-15.

Petitioner's first claim is meritless, as it is well established that attempted burglary[1] is a "crime of violence" for career offender purposes under U.S.S.G. § 4B1.1 and 4B1.2. Therefore, petitioner's second claim -- that he received ineffective assistance of counsel as a result of his lawyer's failure to "object to the improper characterization resulting to [sic] a Career Offenders sentence of the petitioner" -- also is meritless.

Furthermore, to the extent petitioner alleges that his trial counsel[2] was ineffective for other reasons (counsel's failure to object to various sections of Presentence Report, etc.), the court vividly recalls from "the prior proceedings in the case," that petitioner stubbornly refused to cooperate with his court-appointed counsel before, during and after trial and sentencing. At arraignment on November 22, 1993, after the court denied counsel's Motion to Withdraw, petitioner was ordered to make a decision before jury selection whether he wished to

---

[1] The court notes that petitioner initially had been charged in the 1982 count with "Burglary/Illegal Entry of a Dwelling, Attempt Burglary/3rd degree, Criminal Possession of Stolen Property, Criminal Trespass/3rd Degree, and Attempt Criminal Trespass/3rd Degree," and in the 1983 count with "Burglary/Illegal Entry of a Dwelling and Possession of Stolen Property."

[2] Trial counsel was petitioner's second court appointed attorney.

proceed pro se or have his court appointed attorney continue to represent him; he announced that he had decided on the latter option just before jury selection on November 24, 1993. By Order of March 1, 1994, the court denied counsel's Motion to Withdraw prior to sentencing. The record reveals that petitioner he had his attorney continually seek extensions of time within which he purportedly would procure exculpatory information from "various sources in the State of New York and elsewhere." In short, in light of the court's keen recollection of the course of this case and of petitioner's conduct throughout, as fully supported by the record, the orders entered herein, and the transcript of the arraignment, trial and sentencing of Allen Morsely, the court unequivocally concludes that he did not receive ineffective assistance of counsel as that claim is defined in Strickland v. Washington, 466 U.S. 668 (1984).

In conclusion, the court finds that "it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court." Rule 4, Rules Governing § 2255 Proceedings. Consequently, this court is required to cause this action summarily to be dismissed. Id.

It hereby is ORDERED that this action is DISMISSED as utterly meritless pursuant to Rule 4, Rules Governing § 2255 Proceedings. The Clerk of Court shall cause petitioner to be notified.

SO ORDERED.

This 2nd day of May, 1997.

James C. Fox

JAMES C. FOX
United States District Judge

R. 24

Sue Beasley

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:93-CR-102-07-F
No. 5:97-CV-302

ALLEN MORSELY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

O R D E R

Petitioner's July 7, 1997, Motion to Make Additional Findings of Facts and to Amend the Judgment is DENIED. Therein, petitioner attempts to advance claims he abandoned in his initial petition, which was dismissed pursuant to Rule 4, Rules Governing § 2255 Proceedings. Although petitioner set forth a statement of those claims as "Questions of Law" in his petition, he advanced no argument upon them, and they are deemed abandoned.

On May 7, 1997, this court denied petitioner's April 25, 1997, Motion for Extension of Time to supplement his petition, as that motion was filed even after the Government's self-imposed one-year "grace period" ending April 24, 1997, to raise the statute of limitations defense under the Antiterrorism and Effective Death Penalty Act of 1996. The instant motion, accompanied by a 26-page memorandum and exhibits, seeks to accomplish what the court denied by its order of May 7. The

court is confident that its June 3, 1997, order correct and in accordance with the law.

SO ORDERED.

This 11th day of July, 1997.

JAMES C. FOX
United States District Judge

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs MORSLEY, ALLEN

93-102-07-CR-
Yr. | Docket No.

AO 256A

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DE (a)	(b)	(c)
09/06/95	PUBLISHED OPINION - Affirmed in part, vacated in part and remanded by published opinion lc Judge Fox,) ent. 9-6-95)	ms		
10/02/95	JUDGMENT U.S. COURT OF APPEALS - the court affirmed the judgment of the D.Court lc Judge Fox, U.S. Atty.; Probation Pre-trial Services and Marshal. (ent. 10/02/95) ms			
04/22/97	MOTION UNDER 28 USC §2255 TO VACATE, SET ASIDE OR CORRECT SENTENCE - by deft CIVIL NO. 5:97-CV-303-F	gnm		
04/25/97	PETITIONER ALLEN MORSLEY'S MOTION, REQUESTING A 60 DAY EXTENSION OF TIME, PURSUANT TO RULE 15(a) FED. RULES CIVIL PROCEDURE - w/cs lcc: Judge Fox. fs			
04/29/97	Motion submitted to Judge Fox	gnm		
05/07/97	ORDER - petitoner's April 25, 1997, motion for a 60-day extension of time to supplement his §2255 motion is denied (FOX) FOB# 9, p. 209 (ent. 05/07/97) cc: dft	gnm		
06/03/97	ORDER - that this action is dismissed as utterly meritless pursuant to Rule 4, Rules Governing §2255 proceedings (FOX) FOB# 10, p. 54 cc: USA, dft (ent. 06/03/97)	gnm		
06/17/97	ORDER - returning pleading entitled "Memorandum of Law in Support of Petitioner's Motion to supplement Accord" for failure to comply with Local Rules - no original signature (DIXON) FOB# 10, p. 83 cc: dft	gnm		
6/24/97	ORDER - returning the pleading entitled "Motion to make additional findings of fact and to amend the judgment pursuant to Rule 52(b) of the FRCP" for failure to comply with the Local Rules - no original signature (DIXON) FOB#10, p.103 c:served. (e. 6/24/97)	anh		
07/07/97	MOTION TO MAKE ADDITONAL FINDINGS OF FACTS AND TO AMEND THE JUDGMENT PURSUANT TO RULE 52(b) OF FEDERAL RULES OF CIVIL PROCEDURE - by dft w/cs	gnm		
07/07/97	PETITIONER MORSLEY'S MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION TO SUPPLEMENT ACCORD. RULE 15(A) FED CIVIL PROC. IN COMPLIANCE WITH PETITIONER'S MOTION UNDER TITLE 28 U.S.C. § 2255 AND ACCOMPANYING REFERENDUMS HERE WITH - by dft w/cs	gnm		
07/10/97	Case file sent to Judge Fox	gnm		
07/14/97	ORDER - denying petitioner's July 7, 1997 Motion to Made Additional Findings of Facts and to Amend to Judgment - (FOX) FOB# 10, p. 57 cc: dft, USA (ent. 07/14/97)	gnm		
07/31/97	MOTION TO RECONSIDER - by dft w/cs	gnm		
08/25/97	Motion submitted to Judge Fox	gnm		
08/29/97	ORDER - denying motion to reconsider (FOX) FOB# 11, p. 54 cc: USA, dft (ent. 08/29/97)	gnm		
10/06/97	MOTION TO RECONSIDER - by dft	gnm		
10/06/97	MOTION TO SUPPLEMENT PETITIONER'S §2255 - by dft	gnm		
10/06/97	MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION TO SUPPLEMENT HIS §2255 MOTION - by dft	gnm		
10/09/97	Case submitted to Judge Fox	gnm		

Interval (per Section II) | Start Date / End Date | Ltr. Code

97-7813

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

ALAN MORSLEY,

Petitioner,

97 CIV 302-F

against

UNITED STATES OF AMERICA,

(93-102-08-CR-5-F)

Respondent.

APPELLANT'S BRIEF

FRANK J. HANCOCK
Attorney for Appellant
117-16 Queens Boulevard
Forest Hills, N.Y. 11375
718-793-7606

R. 28

slw
97-7813

- NOTICE TO APPELLANTS -

You may be sanctioned if the Court of Appeals finds your appeal is frivolous. Sanctions may include monetary penalties and a ban on filing cases in the future. If you want to avoid a finding that your appeal is frivolous, you may file a MOTION TO DISMISS APPEAL at any time before the Court decides your appeal. A form MOTION TO DISMISS APPEAL is included as the final page of this document. If your motion is granted, you may not later reinstate your appeal.

1. **Jurisdiction (for appellants only)**
   A. What is the name of the court from which you are appealing?
   United States District Court, Eastern District of North Carolina
   B. What is the date(s) of the order or orders you are appealing?
   October 17, 1997

2. **Timeliness of appeal (for prisoners only)**
   When did you give your notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date:

3. **Issues on Appeal**
   Use the following spaces to tell the United States Court of Appeals for the Fourth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellant must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellees may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.

Issue 1.

THE COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THE INDICTMENT AGAINST APPELLANT, GIVEN THAT HE WAS NEVER IDENTIFIED BEFORE THE GRAND JURY, IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT NOT TO BE CHARGED WITH A FELONY, WITHOUT PROPER INDICTMENT

Supporting Facts and Argument.

Appellant was indicted as "John Doe" based on a voice heard over a wiretap, in which he was not the target. The Court without jurisdiction amended the indictment to cover appellant without a superceding indictment by a grand jury

Issue 2.

INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

Supporting Facts and Argument.

COUNSEL FAILED TO FILE OBJECTIONS TO THE PSI AND REFUSED TO FILE APPELLANT"S OBJECTIONS, INCLUDING QUANTITY OFDRUGS ATTRIBUTED TO HIM, WHETHER THE COCAINE WAS, IN FACT, CRACK, ETC APPELLANT WAAS BARRED FROM MAKING CHALLENGE.

Issue 3.

CONVICTION FOR USE OF FIREARM IN DRUG TRANSACTION PURSUANT to 18 USC924 (c) MUST b VACATED, WITHOU IDENCE THAT Thatappellant used firearm

Supporting Facts and Argument.

Issue 4.

THE TIME RESTRAINTS OF THE 1996 ANTI-TERRORISM ACT ARE INAPPLICABLE TO PRIOR CONVICTIONS

Supporting Facts and Argument.

4. **Relief Requested**

What do you want the Court of Appeals to do? Identify exactly the relief you seek.

Vacate conviction or resentence

5. **Prior Appeals (for appellants only)**

A. Have you filed other appeals in this court? x Yes ____ No

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?
U.S. v. Morseley, conviction affirmed, August 31, 1995.

Signature
[Notarization Not Required]

CERTIFICATE OF SERVICE

I certify that on JAN 8, 1998 I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

Signature
[Notarization Not Required]

[List here each party's name and complete mailing address]
U.S. ATTY, EASTERN DIST OF N.C.
310 NEW BERN AVE
RALEIGH, N.C. 27601

97-7813

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

ALAN MORSLEY,

Petitioner,

97 CIV 302-F

against

UNITED STATES OF AMERICA,

(93-102-08-CR-5-F)

Respondent.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Appellant respectfully submits this brief in support of his appeal from the order entered the 17th day of October, 1997 in the United States District Court for the Eastern District of North Carolina (Fox, J.), denying petitioner's motion pursuant to 28 U.S.C. 2255 to vacate the judgment of conviction entered against him on the 24th day of November, 1993. The judgment of conviction was affirmed, on appeal, by the United States Court of Appeals for the Fourth Circuit, but the issues herein, one of which is jurisdictional in the strict sense of the term, given that he was never indicted by a grand jury, were not raised on direct appeal.

STATEMENT OF FACTS

MOSELEY's codefendants, Clyde Andre Hendricks, Melvin Adams, Anthony B. Holly, Stanley Leach, Lenton Earl Jordan, Fletcher Johnson, Tuval McCoy and lori Anne Perry Hendricks were the

subject of an investigation for trafficking in cocaine and firearms. One of the codefendants was a licensed gun dealer and two were law enforcement officers.

One of the investigative tools was wiretapping, pursuant to Court order. Overheard on the wiretaps was an unidentified individual apparently involved in the conspiracy, who was designated as "John Doe," since his true name was not known.

When the case was presented to the grand jury, an indictment was rendered against the named codefendants, as well as one John Doe, the identity of whom was unknown to the grand jury.

On September 23rd, 1993, while executing a search warrant, appellant happened to be on the premises and was arrested. Without sending the case back to the grand jury for a superceding indictment, the Government prepared a formal application to amend the indictment to identity appellant as "John Doe", which motion was granted. It is respectfully submitted that this is perhaps, the most serious violation that took place, in that, by reason of the failure to return the case to the grand jury for a superceding indictment, appellant was brought to trial, without any grand jury having identified him as the "John Doe," listed in the indictment. It is submitted that as a result of the premises, the Court did not have jurisdiction over appellant and at any time, relief could have been granted on a Federal writ of habeas corpus, which this Court may consider this application.

Appellant was brought to trial, represented by assigned counsel, Robert Cooper, with whom the record reflects an acrimonious relationship, given that appellant continued to

deny vehemently that he was the person on the wiretap. During trial several codefendants, who did not testify before the grand jury, testified against him.

Appellant was found guilty of conspiracy to possess with intent to distribute, use of a firearm during a drug trafficking ofeense, wire fraud, engaging in the business of dealing in firearms, without a license, possession and receiving firearms with obliterated serial numbers. On the 24th day of November, 1993, appellant was sentenced to a term of life imprisonment plus five years for possession of a firearm during a drug trafficking offense.

Appeal was taken to the Fourth Circuit, where the conviction was affirmed on the 31st day of August, 1995. The issues here post conviction raised, were not raised, nor considered on the appeal.

POINT ONE

THE COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THE INDICTMENT AGAINST APPELLANT, GIVEN THAT HE WAS NEVER IDENTIFIED BEFORE THE GRAND JURY, IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT, NOT TO BE CHARGED WITH A FELONY, WITHOUT GRAND JURY INDICTMENT.

Following a wiretap investigation of drug and weapons dealing, the case was presented to the grand jury. The targets of the investigation were properly identified and indicted. Evidence was presented that the voice of an unknown person was heard over the wiretaps. No evidence was presented identifying the person and therefore, when the content of the intercepted

conversation was presented, the person was designated as "John Doe."

During the course of the execution of a warrant on September 23rd, 1993, appellant was arrested and a theory was developed by the arresting officers, that appellant was "John Doe." However, the case was not re-presented to the grand jury for a superceding indictment, in order for the grand jurors to rule on whether appellant was "John Doe" and therefore, should be indicted. Instead, the Government made a written application to the Court to amend the indictment, to provide that "John Doe" was appellant. The difficulty is that the Court was without jurisdiction to make such ruling. The Court cannot create its own jurisdiction. Only the grand jury can do so. The Fifth Amendment provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury." A grand jury cannot indict whom it does not know.

"An indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." **Russell v. United States**, 369 U.S. 749, 82 S.Ct. 1038 (1962) "If it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus charged, the restriction which the constitution placed upon the pwoer of the court, in regard to the prerequisite of an indictment, in reality, no longer exists." id

In a very similar case, **United States v. Jay**, 713 F. Supp. 377 (N.D. Ala., 1988), the indictment charged, "Jay (being a black male approximately 20 to 30 years of age, whose identity is otherwise unknown to the grand jury." Gerald Wayne Daniel was brought to trial and convicted. In setting aside the conviction and dismissing the indictment, the Court wrote:

> "Frankly, this court, including its magistrates, were asleep at the switch when they allowed this case to proceed to trial against Gerald Wayne Daniel when he never was named in the indictment."

It was for the grand jury, not the court, to decide whether appellant was the "John Doe," named in the indictment. Without such grand jury presentment, the Court was without jurisdiction to entertain the indictment. The machinery was there for the deployment. All the Government had to do was to present the issue of identification to the grand jury, for a superceding indictment. To allow such shorthand proceedings would be to authorize the grand jury to issue a series of "John Doe" indictments to the Government, to be used to prosecute whomever. Shortcuts lead to abolition of Constitutional guarantees.

POINT TWO

INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING PREJUDICED APPELLANT AT SENTENCING

The case law is legion that the failure of counsel to argue sentencing issues that could have resulted in a different sentence, violates the Sixth Amendment. **United States v. Ford**, 918 F.2d 1343 (8th Circ., 1990) Appellant was barred

from arguing any sentencing issues, for failure to counsel to file objections within fifteen days of sentencing. To aggravate the indifference of counsel, appellant had furnished counsel with a list of objections, which counsel refused to forward to the Court.

Beyond that, counsel failed to send appellant a copy of the PSI report to allow appellant to make his comments. Indeed, sentence should not have been pronounced without appellant's having had a fair opportunity to examine the PSI.

Appellant wanted to object to the amount of drugs attributed to him, which is a proper objection at sentencing. **United States v. Estrada,** 42 F.3rd 228 (4th Circ., 1994) Certainly, there was no evidence that appellant had benefitted from his codefendants' activities. The PSI attributed 5135.35 kilograms of marijana to him, raising the base offense level to 34, without any evidence he had benefitted from such possession. **United States v. Rice,** 49 F.3rd 378 (4th Circ., 1985) The burden is on the Government to support an enhancement. **United States v. Gordon,** 893 F.2d 932 (4th Circ., 1990). The evidence must have a sufficient indicia of reliability. **United States v. Uwaeme,** 975 F2d 1016 (4th Circ., 1982) The Government has the burden of going forward. **United States v. McManus,** 23 F.3rd 878 (4th Circ., 1994). The failure of counsel to give the fifteen day notice of objection, precluded opportunity to object. In addition, the failure to give the fifteen day notice, precluded opportunity to argue for a minor or minimal role reduction. The PSI report reflects that it is not claimed that appellant had a supervisory

position and a reading of the wiretaps reflects that "John Doe" was only in the periphery of the conspiracy. If not a minimal role, argument could have been made that the role was minor. A finding that appellant was less culpable, may have resulted in two point reduction. **United States v. Gordon**, 895 F.2d 932 (4th Circ., 1990) Participation does not preclude a reduction. **United States v. Mullins**, 971 F.2d 1138 (4th Circ., 1992)

In addition, appellant lost the right to challenge whether the substance, itself, crack, given the failure of proof that the substance contained sodium bicarbonate. **U.S.S.G. 2D1.1 (c)** Treating the substance cocaine hydrochloride would have meant lower guidelines. **United States v. Munoz-Realpe**, 21 F.3rd 375 (11th Circ., 1994)

POINT THREE

THE CONVICTION FOR USE OF A FIREARM IN A DRUG TRANSACTION PURSUANT TO 18 U.S.C. 924 (c) MUST BE VACATED, WITHOUT EVIDENCE THAT APPELLANT SO USED A FIREARM.

In **Bailey v. United States**, 116 S.Ct. 501 (1995), the Supreme Court held that a conviction for use of a firearm in drug transaction, in violation of 18 U.S.C. 924 (c) will not lie, for mere possession. There must be more than mere possession, such as displaying, firing, brandishing. Absent such evidence, as in the case at bar, the conviction cannot stand. **United States v. Hayden**, 85 F.3rd 153 (4th Circ., 1996) Convictions prior to the Supreme Court pronouncement in **Bailey** must be vacated, since **Bailey** amounts to a construction of an old statute. **Abreu v. United States**, 1996 WL 5075 (E.D.

Va., 1996)

POINT FOUR

THE TIME RESTRAINTS OF THE 1996 ANTI-TERRORISM ACT ARE INAPPLICABLE TO PRIOR CONVICTIONS

The time limitations of the 1996 Anti-Terrorism Act are inapplicable to "cases" that occurred prior to the promulgation of the statute in 1996, due to the ex post facto safeguard of the Constitution and to the presumption against retroactivity, as held by the United States Supreme Court in **Lindh v. Murphy, 96-6298, S.Ct. 1997 WL 338568.** Moroever, where there is an issue of innocence, as in the case at bar, coupled with a conviction that clearly resulted from a jurisdictional deprivation of Constitutional perogative, as where a defendant is brought to trial, without having been indicted by a grand jury, due process of law requires that a remedy be made available, whether entitled coram nobis or otherwise.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE VACATED AND THE INDICTMENT DISMISSED AND A FULL HEARING ORDERED ON THE ISSUES HEREIN PRESENTED.

Respectfully submitted,

FRANK J. HANCOCK
Attorney for appellant
117-16 Queens Boulevard
Forest Hills, N.Y. 11375
718-793-7606

CERTIFICATE OF SERVICE

I certify that on the 8th day of January, 1998, I mailed a complete copy of this informal brief and all attachments to all parties, addressed as shown below.

FRANK J. HANCOCK

United States Attorney
Eastern District of North Carolina
310 New Bern Ave., Suite 800
Raleigh, N.C. 27601-1461

(Cite as: 153 F.3d 724, 1998 WL 468698 (4th Cir.(N.C.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff--Appellee,
v.
Allen **MORSLEY**, a/k/a Raleek, a/k/a Baldhead, Defendant--Appellant.

No. 97-7813.

Submitted: July 22, **1998**
Decided: August 4, **1998**

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (CR-93-102, CA-97-302-5-F)

Frank J. Hancock, Forest Hills, New York, for Appellant.

Rudolf A. Renfer, Jr., Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Before ERVIN, MICHAEL and MOTZ, Circuit Judges.

PER CURIAM.

1 Allen Morsely appeals the district court's order denying his motion to supplement his 28 U.S.C.A. § 2255 (West 1994 & **Supp.1998) motion and the district court's order denying his motion for reconsideration of the denial of his motion to amend the court's findings pursuant to Fed.R.Civ.P. 52(b). [FN*] We have reviewed the record and the district court's opinion and find no reversible error. The district court did not abuse its discretion in denying the post-judgment motion to supplement the § 2255 motion, or the untimely Rule 52(b) motion. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

FN* We note that the notice of appeal was not timely as to the underlying denial of Morsely's § 2255 motion, so we are without jurisdiction to consider that order.

DISMISSED

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ALLEN MORSLEY, Petitioner	:	No. 1:CV-01-1003
v.	:	(Judge Kane)
DONALD ROMINE, Warden, Respondent	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on December 19, 2001, she served a copy of the attached

RESPONDENT'S RECORD IN SUPPORT OF ITS SUPPLEMENTAL RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS

by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the places and addresses stated below, which is the last known addresses, and by depositing said envelope and contents in the United States Mail in Harrisburg, Pennsylvania.

Addressee:

Allen Morsley
Reg. No. 14718-056
FCI Edgefield
Unit A-1
P.O. Box 724
Edgefield, S.C. 29824

Shelley L. Grant

SHELLEY L. GRANT
Paralegal Specialist